

in the contract, in addition to the guaranteed amount.

[46 FR 7317, Jan. 23, 1981]

§ 778.412 Relationship between amount guaranteed and range of hours employee may be expected to work.

While the guaranteed pay may not cover more than 60 hours, the contract may guarantee pay for a lesser number of hours. In order for a contract to qualify as a bona fide contract for an employee whose duties necessitate irregular hours of work, the number of hours for which pay is guaranteed must bear a reasonable relation to the number of hours the employee may be expected to work. A guaranty of pay for 60 hours to an employee whose duties necessitate irregular hours of work which can reasonably be expected to range no higher than 50 hours would not qualify as a bona fide contract under this section. The rate specified in such a contract would be wholly fictitious and therefore would not be a "regular rate" as discussed above. When the parties enter into a guaranteed pay contract, therefore, they should determine, as far as possible, the range of hours the employee is likely to work. In deciding the amount of the guaranty they should not choose a guaranty of pay to cover the maximum number of hours which the employee will be likely to work at any time but should rather select a figure low enough so that it may reasonably be expected that the rate will be operative in a significant number of workweeks. In both *Walling v. A. H. Belo Co.*, 316 U.S. 624 and *Walling v. Halliburton Oil Well Cementing Co.*, 331 U.S. 17 the court found that the employees did actually exceed the number of hours (60 and 84 respectively) for which pay was guaranteed on fairly frequent occasions so that the hourly rate stipulated in the contract in each case was often operative and did actually control the compensation received by the employees. In cases where the guaranteed number of hours has not been exceeded in a significant number of workweeks, this fact will be weighed in the light of all the other facts and circumstances pertinent to the agreement before reaching a conclusion as to its effect

on the validity of the pay arrangement. By a periodic review of the actual operation of the contract the employer can determine whether a stipulated contract rate reasonably expected by the parties to be operative in a significant number of workweeks is actually so operative or whether adjustments in the contract are necessary to ensure such an operative rate.

§ 778.413 Guaranty must be based on rates specified in contract.

The guaranty of pay must be "based on the rate so specified," in the contract. If the contract specifies a regular rate of \$5 and an overtime rate of \$7.50 and guarantees pay for 50 hours and the maximum hours standard is 40 hours, the amount of the guaranty must be \$275, if it is to be based on the rates so specified. A guaranty of \$290 in such a situation would not, obviously, be based on the rates specified in the contract. Moreover, a contract which provides a variety of different rates for shift differentials, arduous or hazardous work, stand-by time, piece-rate incentive bonuses, commissions or the like in addition to a specified regular rate and a specified overtime rate with a guaranty of pay of, say, \$290 from all sources would not qualify under this section, since the guaranty of pay in such a case is not based on the regular and overtime rates specified in the contract.

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§ 778.414 "Approval" of contracts under section 7(f).

(a) There is no requirement that a contract, to qualify under section 7(f), must be approved by the Secretary of Labor or the Administrator. The question of whether a contract which purports to qualify an employee for exemption under section 7(f) meets the requirements is a matter for determination by the courts. This determination will in all cases depend not merely on the wording of the contract but upon the actual practice of the parties thereunder. It will turn on the question of whether the duties of the employee in fact necessitate irregular hours, whether the rate specified in the contract is a "regular rate"—that is, whether it was designed to be actually